

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
ADMIRAL MERCHANTS MOTOR FREIGHT, INC.	:	DETERMINATION
for Revision of Determinations or for Refund	:	
of Highway Use Tax under Article 21 of the Tax	:	
Law for the Period January 1, 1980 through	:	
December 31, 1983.	:	

Petitioner, Admiral Merchants Motor Freight, Inc., 215 South 11th Street, Minneapolis, Minnesota 55403, filed a petition for revision of determinations or for refund of highway use tax under Article 21 of the Tax Law for the period January 1, 1980 through December 31, 1983 (File No. 801741).

A hearing was commenced before Robert F. Mulligan, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on December 11, 1986 at 2:30 P.M. and continued to conclusion on May 7, 1987 at 1:15 P.M., with all briefs to be submitted by June 26, 1987. Petitioner appeared by Foster & Jensen (Thomas H. Jensen, Esq., of counsel). The Audit Division appeared by John P. Dugan, Esq. (Lawrence A. Newman, Esq., of counsel).

ISSUE

Whether a field audit using a test of available dispatch records properly determined truck mileage tax and fuel use tax due.

FINDINGS OF FACT

1. Petitioner, Admiral Merchants Motor Freight, Inc., is a general commodities carrier.
2. During the period at issue, all of petitioner's New York permitted vehicles were leased from owner/operators. The leased equipment accounted for about 15 percent of petitioner's business and trip leasing accounted for the other 85 percent.
3. Under a trip lease, petitioner hired an owner/operator for a specific trip and paid the

owner/operator a percentage of the gross revenues for the trip. Petitioner did not report any New York trip lease miles, assuming that the owner/operators would report such mileage.

4. Petitioner's loads came from agents who were on a commission basis per load and who were responsible for securing the freight and the driver to move it.

5. Petitioner operated primarily in the Midwest prior to 1967, when it purchased Jack Cole Dixie Highway Company, primarily for its Eastern rights. Jack Cole Dixie Highway Company subsequently merged with petitioner and discontinued operations as a separate entity at the end of 1982.

6. Transcontinental Express, Inc. ("Transcontinental") was acquired by petitioner in or about April 1981 and was operated as a division of petitioner.

7. United Freightways ("United") was acquired by petitioner in November 1982 and was operated as a division of petitioner.

8. Petitioner filed tax returns for itself, Transcontinental and United under the maximum gross weight method of reporting 100 percent laden. Jack Cole Dixie Highway Company filed returns through 1983, although it had ceased operations at the end of 1982.

9. A truck mileage tax and fuel use tax audit of petitioner's records was commenced in January 1984 covering the period January 1, 1980 through December 31, 1983:

(a) The auditors asked for petitioner's daily trip reports reflecting mileage travelled in New York and the routes followed, but these items were not available. The auditors also requested drivers' Interstate Commerce Commission logs, which were not complete. Accordingly, the auditors decided to use petitioner's dispatch records. These records consisted of entries made by petitioner's dispatcher as to every trip dispatched on a particular day. The dispatcher's office was located in Minnesota during the periods at issue.

(b) The first available dispatch records were for the month of April 1981. Dispatch records were tested for April 1981, September 1981 and July 1982, with the following results:

(i) April 1981 - For this month, the dispatch records indicated 1,106 miles in New York; however, petitioner's tax return for the second quarter of 1981 reported no New

York mileage.

(ii) September 1981 - For this month, with one day missing, the dispatch records indicated 1,188 New York miles; however, petitioner's return for the third quarter of 1981 showed no New York mileage.

(iii) July 1982 - For this month, the dispatch records indicated 4,963 New York miles; however, petitioner reported only 245 New York miles for the third quarter of 1982.

(c) The auditors found that commencing with June 1981, petitioner started keeping computer records reflecting New York miles (and mileage for other states) by division, by month. Petitioner's computer records also listed trips by trip number and broke down the miles by trip and by state. The trip numbers were assigned based on trip reports. The auditors checked the trips on the computer runs and the dispatch records to try to find the trip report and identify the trip and the run. The auditors found that two or more trips would often have the same trip number.

(d) Petitioner commenced a large New York operation in November 1982 and the auditors examined the first month and one-half of the operation in detail, i.e., from the start through December 1982. The examination showed that petitioner had travelled 57,475 miles in New York during the six weeks, but had reported only 324 New York miles (314 laden).

(e) The auditors attempted to test May 1983 but the records for said month were incomplete. Accordingly, April 1983 was used as a test period. The test showed the following:

<u>Division</u>	<u>Audited Miles</u>	<u>Miles as per Computer</u>
Admiral Merchants	2,945	1,814
Transcontinental	3,147	1,099
United	18,555	18,076

Petitioner's New York return for the second quarter of 1983 showed only 700 total miles travelled in New York.

(f) Trips listed in the dispatch records were compared to map mileage and audited miles were determined for the test periods. Mileage for the test periods was then "straight lined" (projected) in the years for which a test was made for a particular division. The schedule of New

York audited miles computed is as follows:

AUDITED NEW YORK MILES

<u>Quarter</u>	<u>Admiral</u>	<u>Transcontinental</u>	<u>United Freightways</u>	<u>Total</u>
1st 1980	2,209	--	--	2,209
2nd	2,209	--	--	2,209
3rd	2,209	--	--	2,209
4th	2,209	--	--	2,209
1st 1981	4,418	--	--	4,418
2nd	4,418	3,318	--	7,736
3rd	4,418	3,600	--	8,018
4th	4,418	3,822	--	8,240
1st 1982	8,835	14,889	--	23,724
2nd	8,835	14,889	--	23,724
3rd	8,835	14,889	--	23,724
4th	8,835	14,889	57,475	81,199
1st 1983	8,835	9,441	55,665	73,941
2nd	8,835	9,441	55,665	73,941
3rd	8,835	9,441	55,665	73,941
4th	<u>8,835</u>	<u>9,441</u>	<u>55,665</u>	<u>73,941</u>
	97,188	108,060	280,135	485,383

(g) Total audited New York miles of 485,383 multiplied by the tax rate of \$.039 per mile, amounted to audited truck mileage tax due of \$18,929.94. After deducting \$362.93 in truck mileage tax paid, additional truck mileage tax due was \$18,567.01.

(h) Tests of petitioner's records were calculated to establish a miles-per-gallon factor.

The factors for each year and quarter were as follows:

	<u>Quarter</u>	<u>1980</u>	<u>1981</u>	<u>1982</u>	<u>1983¹</u>
1st	3.96	3.96	3.96	4.38	
2nd	3.89	3.89	3.89	4.38	
3rd	3.97	3.97	3.97	4.38	
4th	3.86	3.86	3.86	4.38	

(i) Audited total New York miles per quarter ("[f]" above) were divided by the miles per gallon rates for each quarter ("[h]" above) resulting in fuel used in New York per quarter. After deducting fuel purchased in New York, the additional fuel deemed needed in New York

¹Since average miles per gallon showed an increase in 1983, an average of 4.38 was used for the entire year.

was multiplied by the tax rate in effect in each quarter resulting in audited tax due. After deducting tax paid, total audited additional tax due was \$18,810.27.

10. On December 28, 1984, the following assessments were issued to petitioner:

(a) Truck mileage tax for the period January 1, 1980 through December 31, 1983 of \$18,567.01, plus penalty and interest of \$7,333.97, for a total of \$25,900.98.

(b) Fuel use tax for the period January 1, 1980 through December 31, 1983 of \$18,810.27, plus penalty and interest of \$7,430.06, for a total of \$26,240.33.

11. The Miscellaneous Tax Bureau computer records reveal that petitioner first filed with the Bureau for truck mileage tax and fuel use tax on October 12, 1976. Permits were issued to petitioner for tractors and trailers as follows:

<u>Year/Month</u>	<u>No. of Permits Issued²</u>
1980 August	2
1981 January	0
February	3
March	4
April	1
May	0
June	0
July	15
August	0
September	8
October	0
November	1
December	16
1982 January	6
February	31
March	0
April	0
May	0
June	2
July	0
August	16
September	2

²Petitioner speculated that the permits issued in August 1980 and in February, March and April 1981 were either obtained as a sales tool or obtained by permanent lessees who applied for permits to make trips through New York for other carriers.

1982 October	23
November	14
December	24
1983 January	20
February	2
March	45
April	9
May	60
June	18
July	4
August	16
September	6
October	6
November	0
December	0

12. (a) At the hearing, petitioner submitted voluminous computer printed records which appear to be those referred to in Finding of Fact "9(c)". The records purport to list trips by date, trip number, unit number, miles and state. Petitioner prepared these records from drivers' reports.

(b) Comparison of petitioner's computer printouts for the month of April 1983 with the detailed audit of the dispatch records for those months shows the following:

<u>Division</u>	<u>Miles Per Computer Records</u>	<u>Miles Per Audit</u>
Admiral	1,814	2,945
Transcontinental	1,099	3,147
United	<u>18,076</u>	<u>18,555</u>
	20,989	24,647

Petitioner's computer printouts showed that 7,404 of the 20,989 total miles were reported by owner/operators of vehicles trip leased to petitioner during April 1983, or a percentage of 35.28. The audit showed that 4,976 miles were actually reported by the owner/operators, resulting in a percentage of 23.71.

(c) New York mileage as per petitioner's computer records commencing with the time such records were kept, i.e., June 1981 (Finding of Fact "9[c]") through December 1983, was 226,479 miles. Total miles travelled in New York State shown on all returns filed by petitioner was 18,894.

SUMMARY OF THE PARTIES' POSITIONS

13. Petitioner concedes that it owes \$5,378.30 in truck mileage tax and \$2,843.42 in fuel

use tax, a total of \$8,221.72. It maintains, however, that its computerized records are accurate and should be used in place of the auditors' projections.

14. The Audit Division claims that petitioner's computer records do not include all New York trips and are thus incomplete and the auditors were correct in projecting mileage from the dispatch records.

CONCLUSIONS OF LAW

A. That Tax Law § 510 provides, in pertinent part, as follows:

"In case any return filed pursuant to this article shall be insufficient or unsatisfactory to the tax commission, or if no return is made for any period, the tax commission shall determine the amount of tax due from such information as is available to the commission."

B. That Tax Law § 507 provides as follows:

"Every carrier subject to this article and every carrier to whom a permit was issued shall keep a complete and accurate daily record which shall show the miles travelled in this state by each vehicular unit and such other information as the tax commission may require. Such records shall be kept in this state unless the tax commission consents to their removal and shall be preserved for a period of four years and be open for inspection at any reasonable time upon the demand of the tax commission."

(See also 20 NYCRR 483.1 et seq [truck mileage tax regulations] and 20 NYCRR 493.1 et seq [fuel use tax regulations].)

C. That petitioner's records were incomplete and inadequate and it was proper for the Audit Division to calculate truck mileage tax and fuel use tax by test periods and projections based upon dispatch records (see ___ Lionel Leasing Industries Company, Inc. v. State Tax Commn., 105 AD2d 581). While petitioner's computer records may be sufficient for its internal controls, absent documentation they are not the type of records contemplated by Tax Law § 507 and the regulations promulgated thereunder.

D. That petitioner's dispatch records make it clear that a substantial number of trips were not recorded in the computer records. While the reason for this appears to be that the individual owner/operators failed to properly report New York mileage, petitioner, nevertheless, is liable for any unpaid truck mileage tax and fuel use tax (Tax Law § 503.1). Moreover, as noted in Finding of Fact "12(b)", petitioner's calculation that 35.28 percent of New York miles were reported by

owner/operators in April 1983 is incorrect; the actual percentage reported was only 23.71 percent.

E. That it was improper for the Audit Division to utilize the April 1981 dispatch records for 1980 and January of 1981. Aside from the two permits issued to petitioner in August 1980, no permits were issued until seven permits were issued in February and March of 1981. Thus, any activity in New York by petitioner prior to February 1981 would have been minimal and would bear no correlation to the April 1981 records. Accordingly, the assessments for 1980 are cancelled and the assessment for the first quarter of 1981 is to be reduced by 33-1/3 percent.

F. That the penalties which had been imposed under former subdivision 3 of Tax Law § 512 are sustained.³ It is noted that petitioner reported only about 4 percent of audited New York miles (after allowing for the adjustment in Conclusion of Law "E") and, more remarkably, only about 8.3 percent of the New York miles shown by petitioner's own computer records (Finding of Fact "12[c]"). While the discrepancy in total New York mileage appears to have been due, at least in part, to improper reporting by owner/operators, the magnitude of the underreporting is such that petitioner should have been aware of the problem and should have rectified it. Petitioner has not shown reasonable cause for remission of the penalty.

Petitioner's argument that Tax Law § 512 is a penal statute and thus the issue of penalty assessment should be decided by a court and jury rather than at the administrative level is without merit. The determination of tax includes penalty and interest and is properly reviewable in the administrative hearing provided for by Tax Law § 510.

G. That the petition of Admiral Merchants Motor Freight, Inc. is granted to the extent indicated in Conclusion of Law "E" and, except as so granted, the petition is denied and the

³With the enactment of Laws of 1985 (ch 65) the provisions of former subdivision 3 of section 512 became covered by subdivision 1 of section 512.

assessments of truck mileage tax and fuel use tax issued on December 28, 1984 are otherwise sustained.

DATED: Albany, New York
February 19, 1988

ADMINISTRATIVE LAW JUDGE